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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1987

RALPH PALIKAPU O KAMOHOALI'I DEDMAN and DR. NOA EMMETT AUWAE ALULI,

Petitioners,

vs.

HAWAII BOARD OF LAND AND NATURAL RESOURCES, ESTATE OF JAMES CAMPBELL and TRUE/MID-PACIFIC GEOTHERMAL VENTURES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

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QUESTION PRESENTED

Petitioners Ralph Palikapu O Kamohoali'i Dedman and Dr. Noa Emmett Auwae Aluli are Native Hawaiians who practice the Pele religion. Pele is an ancient goddess in Hawaiian religious mythology. Petitioners and many other Native Hawaiians believe the goddess is alive today, creating new land on the Island of Hawaii, and that the area comprising the active Kilauea Volcano on that island is the physical manifestation of Pele. Petitioners believe the proposed private development of State owned geothermal resources on the Island of Hawaii will destroy Pele by tapping into her body and blood, and by destroying land which is the sine qua non of Pele religious practice.

Does the "honest conviction" of Native Hawaiian Pele worshipers that essential religious beliefs and practices are infringed by geothermal development satisfy the "burden" prong of the First Amendment free exercise test so that the legal burden shifts to the State of Hawaii to prove a compelling need to develop the geothermal resource?

PARTIES TO THE PROCEEDING

Petitioners Ralph Palikapu O Kamohoali'i Dedman and Dr. Noa Emmett Auwae Aluli are individual Native Hawaiians from the Islands of Hawaii and Molokai, State of Hawaii, respectively. Respondents are the State of Hawaii Board of Land and Natural Resources, The Estate of James Campbell and True/Mid-Pacific Geothermal Ventures.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

Petitioners Ralph Palikapu O Kamohoali'i Dedman and Dr. Noa Emmett Auwae Aluli respectfully pray that this Court issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Hawaii in Ralph Palikapu

O Kamohoali'i Dedman & Dr. Noa Emmett Auwae Aluli v. Hawaii Board of Land & Natural Resources, No. 11334, entered on July 14, 1987.

OPINIONS BELOW

The opinion of the Hawaii Supreme Court is reported as Dedman v. Hawaii Board of Land & Natural Resources, 740 P.2d 28 (Haw. 1987), and is attached to this petition as Appendix A. Relevant portions of the Hawaii Board of Land and Natural Resource's Findings of Fact and Conclusions of Law are attached to this Petition as Appendix B.

JURISDICTION

The opinion of the Hawaii Supreme Court was dated and filed on July 14, 1987. The judgment sought to be reviewed was entered on the same date. Jurisdiction to review the Hawaii Supreme Court's judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1257(3). This petition for writ of certiorari is filed within the 90-day period prescribed by 28 U.S.C. § 2101(c), as computed in accordance with Rules 20 and 29.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[1/]

[1/] In 1940 the Supreme Court applied the First Amendment to the States through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296 (1940).

Article I, Section 4 of the Hawaii Constitution provides in pertinent part: "No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof[.]"

STATEMENT OF THE CASE

Nature Of The Case

This case presents the substantial question of the scope of rights of Native Hawaiian religious practitioners under the free exercise clause of the first amendment to the United States Constitution. Specifically, is sacred geography which is the sine qua non of Hawaiian religious beliefs and practices entitled to protection from the coercive effect of private development of State owned geothermal resources on the Island of Hawaii?

Petitioners Ralph Palikapu O'Kamoholi'i Dedman and Dr. Noa Emmett Auwae Aluli are Native Hawaiian religious practitioners who acknowledge and worship the presence and power of the Hawaiian goddess Pele. Pele religious doctrine, like the doctrine of Native American religions on the mainland, centers on

perpetuating a set of sacred rituals and ceremonies conducted in accordance with the instructions handed down by oral tradition from generation to generation. Each ceremony or ritual derives from a specific prophecy received from Pele in a sacred place determined by her, and must be performed in the manner directed by her. Maintaining the physical integrity of sacred geography to enable Native Hawaiian religious practitioners to preserve the essential harmony with Pele is therefore a critical attribute of the religion.

In this sense Pele religion differs fundamentally from other world religions, such as the major Judeo-Christian religions. These religions are considered as commemorative in nature, commemorating a sacred event or the reenactment of the original revelation by a major religious figure. As such, they

do not emphasize the protection of sacred geography as an essential attribute of religious doctrine or daily religious practice.

The decision of the Hawaii Board of Land and Natural Resources, to permit the private exploration and development of geothermal energy in the Kilauea Middle East Rift Zone ("KMERZ") on the Island of Hawaii, conflicts with Pele religious doctrine and practice. The decision allows disturbance of the physical integrity of a large land area important to religious practice and taps the very life blood of the goddess Pele.

Statement Of Facts

On March 2, 1982, the Estate of James Campbell[1/] filed a Conservation District

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[1/]The Estate of James Campbell is a private estate which owns large tracts of land on the Island of Hawaii. Together with True/Mid Pacific (Cont. on next page)

Use Application ("CDUA") with the Hawaii Board of Land and Natural Resources ("BLNR") to develop geothermal resources at Kahauale'a, Puna, Hawaii. This application was processed and a draft Environmental Impact Statement ("EIS") prepared. Administrative hearings on the application were convened by the BLNR in the fall of 1982. Pet. App. 8, 42-3. The BLNR issued findings of fact, conclusions of law, and a decision and order on February 25, 1983, granting Campbell limited exploration rights within an 800 acre area located at Kahauale'a. Pet. App. 8-9, 43.

In 1983, the Hawaii State Legislature passed Act 296, now codified in HRS §205-5.1 and 5.2, delegating to the BLNR

1/(Cont.) Geothermal Ventures, a private geothermal company from Wyoming, Campbell intends to develop the Island of Hawaii geothermal resources.

the responsibility of designating geothermal resource subzones ("GRS") throughout the State of Hawaii by selecting those areas that demonstrate an acceptable balance among seven criteria. Pet. App. 43-4. Act 151, passed in 1984, gave first priority to the assessment of the Kahauale'a area as a potential geothermal resource subzone and required the BLNR to act on the designation of the Kahauale'a area by December 31, 1984. The Division of Water and Land Development ("DOWALD") of BLNR assessed the Kahauale'a area and proposed a 5300-acre area for designation as a GRS. Pet. App. 9, 44-5.

The BLNR held public information meetings and public hearings as part of the subzone designation process for the proposed Kahauale'a GRS. Pet. App. 45. The BLNR subsequently granted these

requests, conducted administrative hearings on December 12-20, 1984 and issued its decision and order on December 28, 1984. Pet. App. 9-10, 45. In its decision and order, the BLNR designated the 800-acre area, described in its February 25, 1983 decision and order, as a geothermal resource subzone, under certain conditions, including the cessation of volcanic activity in, around, and near the area. Pet. App. 45-49. The BLNR requested that Campbell investigate and consider a land exchange involving State-owned lands in the Kilauea Middle East Rift Zone ("KMERZ") and Campbell's lands at Kahauale'a. Pet. App. 10. The BLNR further decided to consider the KMERZ for designation as a GRS. Pet. App. 11, 49-50. This area had not previously been evaluated as a GRS because of its classification as the Wao

Kele O Puna Natural Area Reserve.[2/]

On August 20, 1985 Campbell filed a CDUA to explore for and develop geothermal energy within the proposed KMERZ/GRS.[3/] The BLNR held a public

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[2/]The Board directed DOWALD to assess the KMERZ in and Adjacent to the Natural Area Reserve beginning on the western boundary of the existing Kamaili GRS. DOWALD conducted its assessment of the KMERZ and subsequently recommended that approximately 11,745 acres of the KMERZ be designated as a GRS. Pet. App. 50.

[3/]The KMERZ/GRS contains approximately 9,014 acres, more or less. Of that area, between 244-304 acres may potentially be used for this project. Of this total, an estimated 244 acres will be directly affected by clearing and/or construction. The KMERZ/GRS is designated as conservation District in the State Land Use classification and is classified as a Protective ("P") Subzone of the Conservation District. This former natural area reserve is currently in its natural state and is mostly forested. The vegetation ranges from high quality native vegetation (wet 'ohi'a forest with dense 80% canopy), to lower quality vegetation and open areas of lava flows in and below the rift zone.

hearing on the proposed designation of the KMERZ as a geothermal resource subzone on September 26, 1985. Pet. App. 11, 49-50. On November 13, 14, and 15, 1985, BLNR conducted administrative hearings on the proposed geothermal resource subzone designation. Pet. App. 11, 49-50. On December 20, 1985, the Board issued a decision and order designating approximately 9,014 acres of the Wao Kele 'O Puna area as a GRS. Pet. App. 11, 50. On December 27, 1985, the Estate of James Campbell and the State of Hawaii executed exchange deeds for Kahauale'a and the Puna Forest Reserve, including the Wao Kele 'O Puna Natural Area Reserve. Pet. App. 11-12. On April 9, 1986, the Board issued its finding of fact, conclusions of law and amended decision and order on the GRS designation. Pet. App. 11, 50.

On December 20, 1985 the BLNR announced that a public hearing on the KMERZ/CDUA would be held. On January 3, 1986 BLNR issued a notice to Campbell accepting the application. Pet. App. 12. The public hearing on the CDUA was held on January 13, 1986. On January 21, 1986, the BLNR announced that administrative hearings would be held on the CDUA. Pet. App. 12.

The BLNR held administrative hearings on Campbell's CDUA on February 18-23, 1986 and on March 14, 1986. Pet. App. 12. Petitioners requested and were granted intervenor status in these hearings. Petitioners Dedman and Aluli testified at the hearings, as well as several other Pele religious practitioners: Pualani Kanahele, Edward Kanahele, and Hannah Kihalani Springer. As to the nature of Pele religion and the

role of the Volcano area in Pele religious belief and practice these witnesses testified to the following uncontroverted facts:

(1) The KMERZ and adjacent areas are the literal home and body of the goddess Pele;

(2) Pele's home and body are sacred;

(3) The Kilauea volcanic area, including the KMERZ, is the source of spiritual power for Pele practitioners, which power is <u>essential</u> for all Pele religious ceremonies and in the daily lives of people who practice the Pele religion;

(4) Individual practitioners, when told to do so, go into the Volcano area to conduct certain specific, private rituals and ceremonies;

(5) Plants, trees, and certain volcanic land forms in the KMERZ and adjoining areas are the sacred embodiment of Pele and medium through which she communicates;

(6) Pele is the magma, the heat, the vapor, the steam and the cosmic creation which occur in volcanic eruptions. She is seen by Pele people in the lava, images of her standing erect, dancing, and

extending her arms with her hair flowing into the steam and clouds.

(7) The kumu hula play an integral role in the Pele religion, translating messages from Pele and communicating them to others in the form of chants and dances. Their "power" is received at sites in the KMERZ and adjacent areas invested with the same spiritual embodiment of Pele.

(8) The literal interpretation of a message from Pele is a prophecy concerning geothermal development:

. . . Come to see my display, to see the movements that I do. To view my inner parts and how I dance and how I move. But you are not welcome to take what is mine. Whatever is hot here is mine. Whatever is hot here is sacred. . . .

See Hawaii Supreme Court Record.[4/]

[4/]Petitioners' interpret Rule 19.1 of the Supreme Court Rules to allow, for purposes of seeking a writ of certiorari, citations to the lower court's record. See Stern & Gressman, Supreme Court Practice 329-33 (6th ed. 1986). Reproduction in the Appendix of the portions of the record to which Petitioners refer would be voluminous. (Cont. on next page)

On March 21, 1986, the parties filed their proposed Findings of Fact, Conclusions of Law, and Decisions and Order. The BLNR issued its Decision and Order granting Campbell's CDUA on April 11, 1986. Pet. App. 12. However, it was not until June 18, 1986 that the BLNR filed its Findings of Fact and

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4/(Cont.) Citations to the record for the above statements include: (1) Oral testimony of Dr. Aluli, G.S. No. 9/26/85-5, TR. Vol. VI, p. 10, 12-13; Oral Testimony of Pualani Kanahele, CDUA No. HA-12/20/85-1830, TR. Vol. VIII, pp. 115, 127-129. (Appellants'proposed findings of fact Nos. 7, 11); (2) Id.; (3) Intervenors' Ex. 2, Prehearing Statements, G.S. No. 9/26/85-5; (4) Id.; (5) Intervenors' Exh. 2, G.S. No. 9/26/85-5. (Appellants' proposed findings of fact No. 16); (6) Ex. 1, Attachment to Intervenors' Joint Testimony, CDUA No. HA-12/20/85-1830; Oral Testimony of Dr. Aluli, G.S. No. 9/26/85-5, TR. Vol. VI, pp. 10-11; Oral Testimony of Pualani Kanahele, CDUA No. 12/20/85-1830, TR. Vol. VIII, p. 127; (7) Id., p. 126; and (8) Oral Testimony of Pualani Kanahele, CDUA No. HA-12-20-85-1830, TR. Vol. VIII, pp. 108-123.

Conclusions of Law with its earlier Decision and Order attached. Pet. App. 13. The Board incorporated by reference all of the record in the previous proceedings related to Campbell's geothermal development applications and GRS designations.

Under this decision, BLNR granted Campbell permission to initially explore, develop, and produce up to 25 megawatts ("MW") of geothermal energy and to explore for an additional 75 MW of geothermal energy. Pet. App. 13. On July 17, 1986 Petitioners filed a timely notice of appeal of the BLNR's decision to the Hawaii Supreme Court. On July 14, 1987 the Hawaii Supreme Court affirmed the BLNR decision.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS IMPORTANT SIMILAR ISSUES ALREADY PENDING BEFORE THE COURT

On May 14, 1987, the Court granted the United States' petition for a writ of certiorari to the Ninth Circuit Court of Appeals in Lyng, et al. v. Northwest Indian Cemetery Protective Association, et al., No. 86-1013 (October Term, 1987). Lyng will be fully briefed, argued and decided this term. From a general perspective Lyng raises the question of the extent to which the federal government's land management activities infringing on geographic areas sacred to Indian religion and religious practitioners are circumscribed by the free exercise clause of the first amendment to the Constitution.

In relation to religious free

exercise rights the federal government advances two essential arguments in Lyng. First, that federal land management activities on public lands as a matter of law do not impermissibly "burden" Indian religion. Second, that a government agency's land management decisions are entitled to substantial deference and should be subjected to a test of "reasonableness" rather than the traditional compelling state interest test. Lyng, Brief On The Merits For The United States Government, pp. 20-36, 37-43.

The case at bar raises these same issues. The State of Hawaii reserved ownership of the geothermal resources in lands exchanged with the Campbell Estate, so this case deals with government property to the same degree as in Lyng. See Pet. App. 11-12. And in both cases

government action is being challenged as burdensome on Native religion: the construction, maintenance and use of a road and related activities by the United States Forest Service in Lyng; here the State of Hawaii's permitting of exploration and development of publicly owned geothermal resources.

The Hawaii Supreme Court's ruling on the burden prong of the free exercise test essentially tracks the argument made in briefs by the federal government on that issue in Lyng. Both argue that there is no "direct" burden to Native religion because government has not enacted a law or regulation expressly proscribing religious belief or practice. Both also argue that "indirect" burden only occurs if a law or regulation either by threat of sanction or conditioning of receipt of a benefit causes someone to

modify his or her behavior or violate religious beliefs. Compare Pet. App. 18-20 with Lyng, Gov. Br. pp. 20-35. See discussion p. 25-28, infra.

Unlike Lyng, the Hawaii Supreme Court did not reach the "balancing prong" of the free exercise analysis because it found no burden on Pele religion. Thus the court did not reach the question of whether there exists a "compelling" need in Hawaii to develop geothermal energy. That issue would be resurrected, however, if the Court here and in Lyng adopts the method for applying the burden prong in Native religion cases set forth herein by Petitioners. Thus the Court's resolution of the matter has important implications if certiorari is granted and this case is set for argument or alternatively remanded in light of the decision in Lyng. See Stern and Gressman, Supreme

Court Practice 221, 274 (6th Ed. 1986); Keney v. New York, 388 U.S. 440 (1967) (per curiam), reversed in light of decision in Redrup v. New York, 386 U.S. 767 (1967). Petitioners strongly believe certiorari should be granted because of the legal parallels between this case and Lyng.

II.

THE DECISION OF THE HAWAII SUPREME COURT ON A SUBSTANTIAL FEDERAL QUESTION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

A. The Hawaii Supreme Court raised two independent grounds for its conclusion that permitting geothermal development on the Island of Hawaii did not impermissibly burden the constitutional free exercise rights of Pele religious practitioners. The court found evidence that Native Hawaiians sincerely believed geothermal development would desecrate the body of Pele, destroy Pele by robbing her of

vital heat, interfere with ritual practices, and disable practitioners from training young Hawaiians. The court held, however, that this evidence did not demonstrate either direct or indirect infringement sufficient to shift the legal burden to the State to prove the compelling need to develop geothermal energy. In the court's terms, for infringement to occur the state law approving geothermal development must either "regulate or directly burden. . . religious beliefs. . ." or "compel them, by threat of sanctions, to refrain from religiously motivated conduct or engage in conduct they find objectionable on religious grounds." Pet. App. 19-20 (citations omitted).

This first ground for rejecting Petitioners' religious claims is premised on a fundamentally narrow, imprecise

reading of Supreme Court free exercise precedent. In this case Petitioners can identify no laws or regulations promulgated by the Hawaiian government which on their face infringe on Native Hawaiian Pele religion. But, this Court has expressly recognized that government laws and regulations are constitutionally invalid if their primary effect is to impermissibly infringe religion. Sherbert v. Verner, 374 U.S. 398 (1963);[5/] Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981);[6/] accord, Hobbie v. Unemployment

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5/"[I]f the purpose or effect of a law is to impede the observance of one or all religions. . . , that law is constitutionally invalid even though the burden may be characterized as being only indirect." Sherbert, 374 U.S. at 404 (emphasis added).

6/"In a variety of ways we have said that '[a] regulation neutral on its face may, in its application, nonetheless offend the (Cont. on next page)

Appeals Commission of Florida, 480 U.S. ____, 94 L.Ed.2d 190, 197 (1987), quoting Thomas and Sherbert. Petitioners' submit that in the case at bar the primary effect of the State's geothermal development laws is to impermissibly burden the Pele religion.

This Court has never expressly limited free exercise protection, as did the Hawaii Supreme Court, to circumstances where the indirect burden of government activity occurs by "threat of sanctions" which forces practitioners to "refrain from religiously motivated conduct or engage in conduct they find objectionable on religious grounds." Pet. App. 19-20.

6/(Cont.) governmental constitutional requirement for neutrality if it unduly burdens the free exercise of religion." Thomas, 450 U.S. at 717, citing Wisconsin v. Yoder, 406 U.S. 205, 220 (1972), and Walz v. Tax Commission, 397 U.S. 664 (1970).

To be sure, cases of indirect government infringement considered by the Court usually involve some threat of sanction or condition upon the receipt of a public benefit that require the compromise of religious faith. However, as Justice O'Connor recently noted, this is attributable more to the nature of our complex society than other identifiable factors.7/

Petitioner's religious claims should not be rejected simply because they do not arise in a context more familiar to

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7/"Even if the Founding Fathers did not live in a society with the 'broad range of benefits [and] complex programs' that the Federal Government administers today, . . ., they constructed a society in which the Constitution placed express limits upon governmental actions limiting the freedoms of that society's members. The rise of the welfare state was not the fall of the Free Exercise Clause. Bowen v. Roy, 476 U.S. ____, 90 L.Ed.2d 735, 765 (1986).

this Court. The distinguishing factor here is that Hawaiian religious beliefs and the practices associated with them fundamentally differ from mainstream Judeo-Christian religions. As a result the nature of government burden which produces infringement necessarily differs from usual cases. Accordingly, the burden prong of the free exercise test must be interpreted and applied in such a way as to fairly evaluate Petitioners' claims; this should not be an invitation to "grant the Government license to apply a different version of the Constitution. . . ." Bowen, id.

By focusing on the primary effect of government action, Court decisions in the free exercise area provide the latitude to do just that. In Thomas for instance, the Court has said that when government activity puts "substantial pressure on an

adherent to modify his behavior and to violate his beliefs, a burden on religion exists." Thomas, 450 U.S. at 718, quoted in Hobbie, supra, 94 L.Ed.2d at 197.

In this case there exists such pressure to modify behavior and to violate beliefs. The Native Hawaiian religious beliefs center on the goddess Pele, a living nature deity. Pele is the very center of the religion, the focus of all religious belief and practice. The recent formation of new land on the Island of Hawaii as a result of eruptions by the Kilauea Volcano adjacent to the area to be developed for geothermal energy are indeed a testament to her creative, life-giving forces.

Geothermal development would destroy Native Hawaiian practitioner access to and use of sacred land which is the sine

qua non[8/] of Pele religious practice, by turning a pristine, virgin rainforest into a spiderweb of pipelines, roads, geothermal wells and production plants. It would by accepted religious doctrine destroy the goddess Pele; and destroying

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8/"Physical access to the land and its natural products must also include the preservation of the natural conditions which are the sine qua non of that access. The efficacy of the natural products and the spiritual well-being of the sacred sites are dependent upon physical conditions. Changing of physical conditions - the spraying and logging of trees, unlimited trapping or removal of original species, alteration of the terrain through river channelization, dams and other methods - not only damages the spiritual nature of the land, but may also endanger the well-being of the Native religious practitioners in their role and religious obligation as guardians and preservers of the natural character of specific land areas." American Indian Religious Freedom Act Report, Federal Agencies Task Force at 54 (August 1979), prepared pursuant to Section 2, American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 92 Stat. 469, 470, 42 U.S.C. §1996.

her would effectively dismantle the religion. In this case Petitioners have shown sufficient evidence of religious burden to meet their obligation under the free exercise clause. Indeed, one would submit that greater burden has been shown here than that established in Sherbert, Thomas or Hobbie.[9/] In a very real sense, then, this is religious infringement or burden of the highest order.

Former Chief Justice Burger noted in Lynch v. Donnelly, 465 U.S. 668, 684 (1984): religious "[e]ntanglement is a question of kind and degree." In a

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9/Sherbert, Thomas and Hobbie all involve the Seventh-Day Adventist creed, and claims of importance of Saturday worship. None of the adherents in those cases ever raised as a matter of honest conviction the prospect that their religions would cease to function as a direct or indirect result of government coercion.

complex society such as ours minority groups often hold very different, seemingly eccentric religious doctrinal views. Religious accommodation through the Court's application of the free exercise test thus must also "vary in kind and degree" depending on the vagaries of religious doctrine and practice, to avoid the "hostility" and "callous indifference" consistently spurned by this Court. Id. at 673. Otherwise the admonition that the first amendment "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship", Wallace v. Jaffree, 472 U.S. 38, 50 (1985), quoting Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), holds but an empty promise for practitioners of minority faiths. For if some fair accommodation is not made for the religious practices

of Native faiths the practitioners have no alternative but to accept some other form of religious doctrine for which the dominant society has demonstrated more tolerance.

B. The Hawaii Supreme Court's second ground for rejecting Petitioners' claim is equally unsound. The court reasoned that Petitioners failed to show a "substantial burden" on religion because in the court's view neither they nor other Pele witnesses proved that they ever used the area for religious rituals or ceremonies: it held the "mere assertion of harm to religious practices" was insufficient. Pet. App. 22.[10/]

[10/]The Hawaii Supreme Court also attempts to elevate claims of science above religious belief by reasoning that there "is no indication that tapping this heat source from the earth has diminished or negatively affected the eruptive nature of the Kilauea Volcano." Pet.
(Cont. on next page)

First, the court fundamentally misunderstood the nature of religious use of the area. There is evidence in the record of ritual, ceremonial use. But it is impossible for practitioners to identify the precise sites holding sacred value to Pele people. Kumu hula (hula teacher) Pualani Kanahele testified that individual practitioners, when directed by Pele to do so, go into the Volcano area to conduct private ceremonial rituals.[11] Petitioner Aluli testified that practitioners "can't pick and choose

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10/(Cont.) App. 21. But the very purpose of the free exercise clause is to protect sincerely held and deeply rooted religious beliefs from the whim and arrogance of those in positions of authority in government. See Watson v. Jones, 80 U.S. (13 Wall.) 679, 682 (1871); United States v. Ballard, 322 U.S. 78,86 (1944); United States v. Seeger, 380 U.S. 163, 184 (1965).

11/See Statement of Facts, p. 14, supra.

where Pele is or when people want or need or are told to practice their religion or to offer." A central, universal aspect of Native religion is that "men are not free to pick and choose the sacred site, that they only seek for it and find it by the help of mysterious signs." M. Eliade, The Sacred and The Profane: The Nature of Religion (Harper & Rowe, New York 1959) at 28 (emphasis original).[12/]

[12/] In this respect the error of the lower court's findings of fact concerning burden on religion is "obvious and exceptional." Stern & Gressman, supra at pp. 217-8. Despite evidence in the record supporting the conclusion of "obvious and exceptional showing of error", such a strict standard may not even apply here. The findings of the BLNR were by law subject to review directly by the Hawaii Supreme Court and not by a trial court or court of appeals. Under the circumstances a substantial evidence standard is more appropriate. Id. at 218. Petitioners believe granting a writ of certiorari is appropriate here not only to correct the erroneous factual findings but also to correct the legal analytical flaws in the lower court's analysis discussed supra and infra. See Stern & Gressman, id. at 217.

Second, the lower court's reasoning relies on a misreading of Yoder, Sherbert, Thomas and Hobbie, and charts a course which invites an ethnocentric treatment of Native claims which this Court should correct. As noted above, a religious adherent satisfies his burden under the first prong of the free exercise test when he demonstrates that the primary effect of a government action is to put "substantial pressure on [him] to modify his behavior and to violate his beliefs. . . " Thomas, supra, 450 U.S. at 718. The determination of whether an adherent in fact feels sufficient pressure to react in a manner inimical to religious belief, so as to constitute a constitutionally impermissible "burden", is a matter for which courts must rely on the adherents' own testimony. The Court made clear in Thomas: "The narrow function of a reviewing court in this

context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion." Id. at 716 (emphasis added).[13/] In the case at bar, however, the Hawaii Supreme Court - while neither challenging their legitimacy or sincerity - ignored the honest convictions of the Pele religious practitioners. The uncontroverted evidence of Petitioners and other Pele practitioners established the role of the Volcano area and the

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13/The rationale for this approach is clear:

> Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Id. at 716.

importance of preserving its physical integrity. The court, however, chose instead to rely by negative implication on the absence of evidence of specific use of precise sites in the KMERZ to deny Petitioners' claims.

Petitioners' have maintained all along it was not their burden under the free exercise test to identify the precise location and use of ritual sites. The entire volcano area is sacred because of the various Pele manifestations identified above. As in Thomas, the court should have accepted the uncontroverted, "honest convictions" of Petitioners and other Pele religious practitioners as sufficient to meet their obligation under the burden prong. It was, in short, error for the Hawaii Supreme Court to rule that "mere assertions of harm" were insufficient.

The fundamental flaw in the court's analysis stems from a misreading of Sherbert and Yoder. Sherbert and Yoder do not examine the degree or severity of religious burden until the second, balancing prong of the free exercise test. These questions are not examined by the Court in the first phase of the test, where it is determined whether government action threatens to impose some impermissible burden on religion. By examining the degree of infringement on Pele religion as a precondition to shifting the legal burden to the State of Hawaii, the court unfairly tipped the free exercise scales against Petitioners' claims. Such an approach is foreign in Supreme Court free exercise precedent.

For instance, the Court in Sherbert did not as a precondition of establishing infringement require Adelle Sherbert to

establish the degree and severity of the burden. The Court accept as her "honest conviction" that a burden existed; South Carolina law was found to "impede the observance" of her religion. The Court did refer to Saturday worship as a "basic tenet of the Seventh-Day Adventist creed", but only in a footnote when assessing the strength of her claim and the degree of infringement. See Sherbert, supra, 374 U.S. at 399, n. 1.

And the Court in Yoder did not as a condition of establishing infringement require Jonas Yoder and Warren Miller to prove that Amish compliance with Wisconsin compulsory attendance laws would destroy the practice of essential elements of Amish religious doctrine. It found the effect of the law to be "severe" and "inescapable". But the lengthy discussion of the "fundamental

beliefs" of the Old Order Amish was directed to measuring the degree of burden. Yoder, supra, 406 U.S. at 210.

An assessment of the degree of religious infringement is necessary in free exercise analysis.[14/] But the point in the analysis at which that occurs is critical. It should not occur as a threshold inquiry to deny claims of the Native Hawaiian religious practitioners, but is more appropriately a mechanism for balancing the respective individual and governmental interests at

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14/The first step in the Sherbert free exercise analysis - proving that sincerely held beliefs, rooted in religion, are at stake - will take care of spurious or fraudulent claims. See, e.g., People v. Woody, 394 P.2d 813, 821 (Calif. 1964) (". . . courts of necessity must ask whether the claimant holds his belief honestly and in good faith or whether he seeks to wear the mantle of religious immunity merely as a cloak for illegal activities."), citing United States v. Ballard, 322 U.S. 78 (1944).

stake in a dispute such as that presented here.

Yoder may have invited its own misapplication. By inquiring into the "quality of the claims" presented by the Amish, 406 U.S. at 215, the Court opened up the possibility that lower courts might construe this as a threshold inquiry against which to mechanically compare the unorthodox beliefs and practices of other minority religions. This Court has long recognized the dangers inherent in allowing courts to pass judgment on whether an individual's religious claims are "central" enough or "fundamental" enough to shift the legal burden to the government to show a compelling interest sufficient to overcome such claims.

In Thomas, Chief Justice Burger cautioned against such an application of

Yoder. Indeed, in Thomas he began his analysis by citing Yoder and Sherbert as authority for the standard that beliefs and practices are to be protected if "rooted in religion." Thomas, supra, 450 U.S.at 713-4. Whether a practice satisfies that standard must not

> turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensive in order to merit First Amendment protection.

Id. at 714; cf. United States v. Lee, 455 U.S. 252, 257 (1982).[15/] One commentator

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15/"No doubt the courts may properly question a defendant's honesty, sincerity and good faith; it would seem, however, that once a practice is deemed to be religious, questions regarding what is "essential" as opposed to "important", what is "indispensable" as opposed to "desirable" in a religion, is better left to theologians." Marcus, The Form of Conscience: Applying Standards Under The Free Exercise Clause, 1973 Duke L.J. 1217, 1250-51.

has concluded that the Court agreed to hear Thomas precisely to clarify that Yoder is not to be applied restrictively, and to caution against judicial inquiry into the nature or validity of religious belief.[16/]

Such an approach does not unfairly tip the scales in favor of Native religious claims to sacred land. But on the other hand it does not allow courts, otherwise unfamiliar with the vagaries of Native religion or predisposed to yield to the arrogance of perceived governmental needs, to avoid a fair balance of the respective interests at stake. Rejecting such "covert balancing" may change the outcome of some Native free exercise cases involving sacred geography.

16/Pepper, The Conundrum of the Free Exercise Clause - Some Reflections On Recent Cases, 9 N.Ky.L.Rev. 265, 285 (1982).

In terms of this case, then, to determine whether the burden prong was met the Hawaii Supreme Court should have focused exclusively on the specific nature of Pele religious doctrine and practice. As set out earlier, an essential attribute of Native religion is the need to maintain harmony with spiritual deities through the protection of sacred geography. In many instances that sacred geography is the location of many important ritualistic practices. Here the entire KMERZ area has religious significance because of the manifestation of Pele in various forms - volcanic eruptions, lava, steam, vapor, etc. - in the area.[17/] Moreover, the

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17/"Pele is the magma, the heat, the vapor, the steam and the cosmic creation which occur in volcanic eruptions. She is seen in the lava, images of her standing erect, dancing and extending her arms with her hair flowing into the steam and clouds." See pp. 14-15, supra.

entire Kilauea Volcano area represents the very body of Pele, a living goddess.[18/]

18/Pualani Kanahele demonstrated a hula to the Board of Land and Natural Resources which as translated described the essence of Pele's life connection to the KMERZ:

> This last chant is a mele ma'i for Pele. And Mele ma'i tells about the different parts of her body. As is appropriate for all hula performances, you should close the performance with a mele ma'i. This particular mele ma'i tells about Pele and her different parts. And especially describes hale ma'u ma'u and in that song, E komo mai oloko hale ma'u ma'u, come into hale ma'u ma'u, come into hale ma'u ma'u, you're welcome. Come to see my display and how I dance and how I move. But you are not welcome to take what is mine. Whatever is hot here is mine. Whatever is hot here is acted. Her back is hot, as I said earlier, and so her back is sacred. But it's [not] only her back that we're talking about, the literal back, it's that whole part of the land that is hot, that is sacred.

See p. 15, supra.

In short, the correct focus from Yoder, Sherbert and Thomas in Native religion cases should be on the function of sacred geography in religious doctrine and practice, and the affect on that practice when the physical integrity of the area is threatened by some government activity. To gauge this courts must accept the "honest convictions" of religious adherents, not reject them as "mere assertions." The extent of actual use of a physical area may be relevant to a court's inquiry, but not until examining the degree of burden when balancing respective government and religious interests.

The Hawaii Supreme Court's decision here reflects the continuing tendency of lower courts in Native sacred site cases to engage in improper "covert" balancing in the burden prong of the free exercise

test.[19] In other words, courts unfairly elevate the threshold in the burden prong to a level Native religious practitioners, in most instances, cannot meet.[20] This Court has an opportunity to correct that flaw both here and in Lyng.

Under the above approach advocated by Petitioners, they have met the "coercive effect" test as articulated by Sherbert and Yoder. Because of the nature of Pele religion and the role of the entire Kilauea Volcano area in Pele religious

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19/This same analytical flaw is present in cases such as Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980); Wilson v. Block, 708 F.2d 735 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983).

20/The decision of the Ninth Circuit Court of Appeals in Lyng is one instance where, despite reliance on the analytically flawed test, the Indian litigants demonstrated an impermissible burden on religious practice.

doctrine and practice, the proposed geothermal development would be definition have a coercive effect: it would "impede the observance" in Sherbert terms; its effect in Yoder terms would be "severe" and "inescapable."

The degree of infringement on Pele religion, as measured by the degree of centrality or importance of the Volcano area to Pele religion, is more legitimately the court's focus in the "balance" prong of the free exercise test. For obvious reasons, degree of infringement is relevant at that stage.[21/]

21/Marginally important religious practices may not require protection irrespective of the degree of importance of a government interest, but the more important the religious interest - especially in cases of minority faiths - the greater the need for a court to find a compelling government interest justifying infringement. See, generally, Pepper, Taking The Free Exercise Clause Seriously, 1986 B.Y.U.L.Rev. 299, 308-316.

By employing a closer examination of a religion and the expected degree of infringement as a balance against government interest, and not as a subjective threshold device, courts are then put in a position of having to more fairly evaluate the respective claims. This is the approach favored, indeed compelled, by Yoder, Sherbert and Thomas. The alternative approach invites the ethnocentric, subjective whim of the court in such a way as to avoid careful scrutiny by reviewing courts and others.[22/]

22/ See Pepper, Taking the Free Exercise Clause Seriously, supra at 314:

> Thus, the importance of something like the Sherbert-Yoder doctrine, of the requirement that even facially and intentionally neutral government action not impinge on the religious practices of minorities, becomes evident. The smaller the minority, the more likely the majority will inadvertently impose on its (Cont. on next page)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Cont.) religious interests, and therefore the greater need for protection under the free exercise clause.